

Appeal from a decision of the Alaska State Office, Bureau of Land Management, determining not to recalculate the acreage of submerged lands chargeable against a Native regional corporation's entitlement under the Alaska Native Claims Settlement Act. AA-8096-4, AA-42912, AA-50379-1, and AA-50379-5.

Affirmed.

1. Alaska National Interest Lands Conservation Act: Special Land Settlements -- Alaska Native Claims Settlement Act: Conveyances: Acreage Entitlement -- Alaska Native Claims Settlement Act: Conveyances: Interim Conveyance -- Alaska Native Claims Settlement Act: Conveyances: Regional Conveyances -- Regulations: Applicability -- Submerged Lands

The number of acres of submerged land chargeable against the entitlement of Chugach Alaska Corporation under secs. 12(c) and 14(h)(8) of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1611(c) and 1613(h)(8) (1982), for interim conveyances made prior to Dec. 5, 1983, and resulting from a settlement agreement signed by the Secretary of the Interior, is properly calculated in accordance with 43 CFR 2650.5-1(b) (1982), as required by that agreement, regardless of a subsequent change in Secretarial policy and amendment of that regulation.

APPEARANCES: Frederick H. Boness, Esq., for Chugach Alaska Corp.; James B. Snow, Esq., Office of the General Counsel, U.S. Department of Agriculture, Washington, D.C., for the U.S. Department of Agriculture; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE HARRIS

The Chugach Alaska Corporation (Chugach) 1/ has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated

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1/ Chugach (formerly known as Chugach Natives, Inc. (CNI) is a Native regional corporation.

November 27, 1985, determining not to recalculate the acreage of submerged lands chargeable against Chugach's entitlement under the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. §§ 1601-1629a (1982), with respect to conveyances to Chugach made prior to December 5, 1983. In so doing, BLM effectively denied a May 13, 1985, request by Chugach that BLM recalculate submerged land acreage chargeability. 2/

The issue presented by this case is whether certain submerged lands within areas conveyed to Chugach are properly chargeable against Chugach's ANCSA acreage entitlement. However, before addressing that issue, we will briefly set out the relevant background necessary to consideration of the issue.

On December 18, 1971, in an effort to settle Native land claims in Alaska, Congress enacted ANCSA, which provided in sections 12(c) and 14(h)(8), 43 U.S.C. §§ 1611(c) and 1613(h)(8) (1982), for allocations of public land to Native regional corporations, which were organized under the Act.

On December 2, 1980, Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA), P.L. No. 96-487, 94 Stat. 2371. In section 1430(a) of ANILCA, P.L. No. 96-487, 94 Stat. 2531 (1980), Congress specifically directed the Secretaries of the Interior and Agriculture and the Alaska Land Use Council, in conjunction with Chugach and the State of Alaska, if the State so desired, to study "land ownership and use patterns in the Chugach region." Congress stated that the purpose of the study was "to identify lands \* \* \* which can be made available for conveyance to Chugach Natives, Incorporated; \* \* \* to obtain a fair and just land settlement for the Chugach people; and realization of the intent, purpose and promise of the Alaska Native Claims Settlement Act by the Chugach Natives, Incorporated." 3/ 94 Stat. 2531. Congress directed the study participants to consider all options "which the participants in the study consider to be appropriate to achieve the objectives." Id.

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2/ This case specifically concerns the following interim conveyances issued to CNI, as identified in Chugach's May 1985 request: Carbon Mountain (No. 756), 26,584 acres of land conveyed Oct. 21, 1983; Eagle Bay (No. 637), 120 acres of land conveyed Mar. 31, 1983; Patton Bay (No. 668), 12,891 acres of land conveyed May 31, 1983; and Bering River (No. 757), 46,651 acres of land conveyed Oct. 21, 1983. These conveyances were issued pursuant to selection applications AA-8096-4, AA-50379-1, AA-42912, and AA-50379-5, respectively. At the time of the interim conveyances, the lands involved were unsurveyed or only partially surveyed. Accordingly, the interim conveyances were made subject to issuance of a patent after approval and filing by BLM of an official or supplemental plat of survey, confirming the boundary description and acreage granted.

3/ Chugach explains in its statement of reasons for its appeal (SOR), at page 1, that the United States was unable to fulfill Chugach's ANCSA entitlement because much of the land withdrawn by the Secretary of the Interior for selection by Chugach was "ice fields and mountain tops," and that sec. 1430 of ANILCA was enacted as a result of those "inequities."

Also, in section 1429(a) of ANILCA, P.L. No. 96-487, 94 Stat. 2530 (1980), Congress authorized Chugach, within 180 days after enactment of ANILCA, "to select public lands not reserved for purposes other than National Forests from within the Chugach Region under section 14(h)(8) of the Alaska Native Claims Settlement Act from within the boundaries of the Chugach National Forest." Such selections were to be made subject to valid existing rights and to the provisions of any proposal "implemented pursuant to section 1430 of this Act." 94 Stat. 2530.

As a result of the study directed by section 1430 of ANILCA, the United States and Chugach reached a settlement of Chugach's entitlement under sections 12(c) and 14(h)(8) of ANCSA on June 5, 1982. On January 7, 1983, the Secretaries of the Interior and Agriculture and representatives of Chugach executed an agreement, entitled the "1982 CNI Settlement Agreement" (Settlement Agreement). The State executed the agreement on January 10, 1983. That agreement, a copy of which was provided on appeal by Chugach, stated that the "result of this final settlement will be that CNI shall receive the acreage equivalent of its entitlement under Sections 12(c) and 14(h)(8) of ANCSA" (Settlement Agreement at 2). The agreement stated that Chugach's "entitlement" under section 12(c) of ANCSA was 338,665.08 acres and that its "estimated entitlement" under section 14(h)(8) of ANCSA was 33,167 acres. Id. at 3. In satisfaction of that total entitlement, the agreement provided for conveyance of certain lands pursuant to paragraph 4 of the agreement and other lands "selected pursuant to section 12(c) of ANCSA, and not relinquished." Id. Paragraph 4 of the agreement specifically provided for conveyance of lands from the United States, including the tracts herein, in exchange for certain selection rights, lands and interests in land described in paragraph 12 of the agreement. Paragraph 4 of the agreement described the tracts of land to be conveyed by aliquot part, with no exclusion of any submerged land or any indication of the individual acreage involved. The four tracts of land involved herein were listed as among Chugach's "highest priorities for conveyance" at the time of the Settlement Agreement. 4/ Id. at 72.

With respect to the calculation of Chugach's acreage entitlement, paragraph 2(c) of the Settlement Agreement provides, as a general matter, that "[e]ach acre of land or an interest in land conveyed to CNI pursuant to paragraph 4 of this Agreement or under Sections 12(c) or 14(h)(8) of ANCSA shall be counted for purposes of calculating the full acreage entitlement of CNI \* \* \*" (Settlement Agreement at 3). That paragraph must be read together with paragraph 21 of the agreement. Paragraph 21 of the agreement specifically defines the chargeability of submerged lands against Chugach's

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4/ The Settlement Agreement, in paragraph 11, set out "target dates" for the conveyance of the four tracts involved herein: Eagle Bay (Mar. 29, 1983); Patton Bay (Apr. 1, 1983); Bering River (May 13, 1983); Carbon Mountain (May 13, 1983) (Settlement Agreement at 72). The agreement provided that the Secretary "shall make his best effort to convey to CNI the tracts \* \* \* by the proposed target dates." Id.

entitlement. Paragraph 21(A) provides that the Secretary of the Interior will determine the navigability of water bodies prior to the conveyance of any lands to Chugach and that: "For purposes of charging acreage against CNIs entitlement, the Secretary of Interior shall apply the rules and procedures relating to submerged lands applicable to conveyances under ANCSA which are validly in force at the time of the conveyance" (Settlement Agreement at 128).

At the time of execution of the Settlement Agreement, the applicable Departmental rule regarding the chargeability of submerged lands within areas to be conveyed to Native corporations under ANCSA stated that:

The beds of all bodies of water determined by the Secretary to be navigable shall be excluded from the gross area of the surveys and shall not be charged to total acreage entitlements under the act. \* \* \* The beds of all bodies of water not determined to be navigable shall be included in the surveys as public lands, shall be included in the gross area of the surveys, and shall be charged to total acreage entitlements under the Act. The beds of all non-navigable bodies of water comprising one half or more of a section shall be excluded from the gross area of the surveys and shall not be charged to total acreage entitlement under the act, unless the section containing the body of water is expressly selected or unless all the riparian land surrounding the body of water is selected.

43 CFR 2650.5-1(b) (1982).

Thereafter, between March and October 1983, BLM issued the four interim conveyances involved herein. Effective December 5, 1983, the Department issued a notice of interim waiver of regulations and establishment of policy, which was published in the Federal Register (48 FR 54483 (Dec. 5, 1983)). That notice stated that the "regulations at 43 CFR 2650.5-1(b) are hereby waived pending the publication of final rules reflecting the Department's change in policy related to the chargeability of submerged lands" and "[e]ffective immediately," Native corporations "shall not be charged for submerged lands beneath water bodies hereafter meandered in accordance with this waiver or subsequent regulations." 48 FR 54483 (Dec. 5, 1983). The notice stated that submerged lands would be meandered "in accordance with the principles in the Bureau of Land Management Manual of Surveying Instructions, 1973 [Survey Manual], Sections 3-115 through 123." Id. (Emphasis in original). 5/

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5/ Section 3-115 of that manual provides that: "All navigable bodies of water and other important rivers and lakes are segregated from the public lands at mean high-water elevation. In original surveys, meander lines are run for the purpose of ascertaining the quantity of land remaining after segregation of the water area" (Survey Manual at 93). "[I]mportant rivers and lakes" are, with certain exceptions, identified in sections 3-120 and 3-121 of the manual as navigable rivers, non-navigable rivers 3 chains or more in width and lakes with an area of 50 acres or more. Id. at 96, 97.

In addition, the notice provided that, in the case of approved survey plats, chargeable acreage would not be adjusted where the land had already been patented to a Native corporation, but that, where the land had not been patented, "the acreage of meanderable water bodies appearing on the plat will be calculated and not charged against entitlement." Id.; see generally Wilderness Society v. Griles, 824 F.2d 4, 7 (D.C. Cir. 1987).

On August 7, 1984, the Department published proposed rulemaking in the Federal Register (49 FR 31475), for the purpose of amending 43 CFR 2650.5-1(b) (1982) to conform to the Secretary's new policy on submerged land acreage chargeability. Effective May 20, 1985, the Department finalized the amendment of 43 CFR 2650.5-1(b) (1982). See 50 FR 15546 (Apr. 19, 1985). The amended regulation provides that, in the case of approved survey plats, the acreage of meanderable water bodies, already charged against a Native corporation's entitlement, would be calculated in accordance with the Survey Manual and not charged against that entitlement. 43 CFR 2650.5-1(b)(1). In the case of survey plats "approved after December 5, 1983," the amended regulation provides that water bodies would be meandered and segregated from the survey in accordance with the Survey Manual "as the basis for determining acreage chargeability." 43 CFR 2650.5-1(b)(2).

In its May 13, 1985, letter, Chugach formally requested that BLM apply the "Secretary's new policy" with respect to the chargeability of submerged lands to the four interim conveyances involved herein. Chugach stated that it had calculated "approximately 3350 acres of submerged lands which meet the meanderability criteria and which have not been excluded from title documents conveying the lands" (Letter, dated May 13, 1985, at 1). In its November 1985 decision, BLM effectively denied Chugach's May 1985 request, concluding that, under the terms of the Settlement Agreement, it could not "recalculate submerged lands on those conveyances issued to [Chugach] pursuant to the Agreement prior to December 5, 1983." In so holding, BLM specifically cited the language in paragraph 21(A) of the agreement that, in determining submerged land acreage chargeability, the Secretary shall apply the rules "validly in force at the time of conveyance" (Settlement Agreement at 128). Chugach has appealed BLM's November 1985 decision.

We now turn to the issue presented in this case -- whether certain submerged lands within areas under interim conveyances to Chugach made prior to December 5, 1983, are properly chargeable against Chugach's ANCSA entitlement. To resolve that issue, we must determine what rules govern chargeability in this case.

On its face, paragraph 21(A) of the Settlement Agreement required that chargeability be determined in accordance with 43 CFR 2650.5-1(b) (1982), which was the rule in effect at the time of the conveyances. On the other hand, the Secretary's policy, as enunciated in the December 1983 Federal Register notice, might appear to be equally applicable to the conveyances, since the notice was expressly applicable in the case of unsurveyed land and land subject to approved survey plats where no patent had issued. That is the situation with the conveyances at issue. Thus, 43 CFR 2650.5-1(b)

(1982) provided generally that submerged lands under non-navigable bodies of water were chargeable against a Native corporation's ANCSA entitlement, while the December 1983 Federal Register notice and subsequent regulations provided that submerged lands under meanderable bodies of water, including certain non-navigable rivers and lakes, were not chargeable against a Native corporation's entitlement.

Chugach's principal argument is that paragraph 21(A) of the Settlement Agreement did not either expressly or implicitly preclude Chugach from taking advantage of the subsequent change in the Secretary's policy with respect to the recalculation of chargeable acreage. In its SOR, at 8, Chugach argues that: "The language simply does not address the situation where new rules and regulations themselves require acreage to be recalculated. It is not inconsistent with paragraph 21 to recalculate acreage because the new regulations require such recalculation for all conveyances made under the old regulations." Chugach contends that application of the Secretary's new policy to conveyances made prior to December 5, 1983, as well as those made after that date, promotes consistency in the treatment of all Native corporations, which was the predominant objective of the Settlement Agreement. <sup>6/</sup> BLM's response to Chugach's arguments is that chargeability is governed by the "specific language" of paragraph 21(A) of the Settlement Agreement, which incorporated the regulation in effect at the time of interim conveyance, thus precluding the applicability of the amended regulation (BLM Answer at 5). This position is supported by the U.S. Department of Agriculture (See Department of Agriculture Answer at 5).

We disagree with Chugach's interpretation of paragraph 21(A) of the Settlement Agreement. That paragraph precludes application of the Secretary's new policy on chargeability eventually set forth in the May 1985 amendment of 43 CFR 2650.5-1(b) (1982). It is clear that, by providing that chargeability would be determined in accordance with the "rules" in effect at the time of conveyance, paragraph 21(A) of the agreement fixed the applicable regulations and precluded the application of other regulations, even where the later-adopted regulations provided for a recalculation of chargeable acreage in approved survey plats. We recognize that the 1985 regulations have the force

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<sup>6/</sup> Chugach provided the June 25, 1986, affidavit of Carl A. Propes, who was Chugach's Director of Land and Natural Resources in 1982 and "thoroughly involved with all aspects of negotiating the 1982 CNI Settlement Agreement on behalf of Chugach" (Affidavit, at 1). Therein, Propes stated:

"4. In 1982, I was aware of the possibility that the Department of the Interior might change the chargeability policy on navigable lands.

"5. I was concerned that if such policy was changed, that Chugach might be treated differently because its lands were being conveyed pursuant to the Settlement Agreement. I did not want Chugach to be treated differently than other Native regional corporations with respect to submerged lands policy.

"6. I do not recall who first proposed the language in paragraph 21(A), but I do know that it was acceptable to Chugach because it ensured equal treatment." (Affidavit at 2).

and effect of law (see Chugach Alaska Corp., 94 IBLA 24 (1986), appeal filed, Chugach Alaska Corp. v. Hodel, No. A 87-066 (D. Alaska Feb. 18, 1987)); however, their applicability to the conveyances involved herein is determined by the Settlement Agreement, which was a contract equally binding on the Secretary of the Interior and his delegated representatives. See Perry v. United States, 294 U.S. 330, 351-4 (1935). That agreement clearly cannot be deemed to have been obviated by the subsequent unilateral change in Secretarial policy and amendment of 43 CFR 2650.5-1(b) (1982). Paragraph 37(c) of the Settlement Agreement provides that the agreement may be amended "only \* \* \* by a written instrument executed by all the parties" (Settlement Agreement at 139). 7/

In the case of the conveyances at issue, the "time of conveyance" was the time of issuance of the interim conveyance. Such interim conveyances effectuated a conveyance of the land as fully as would the eventual issuance of patents. 43 U.S.C. § 1621(j)(1) (1982). The "rules" regarding the chargeability of submerged land in effect at the time of conveyance were set forth at 43 CFR 2650.5-1(b) (1982). Therefore, we conclude that, in the case of the four interim conveyances, chargeability must be determined in accordance with 43 CFR 2650.5-1(b) (1982). That result is mandated by paragraph 21(A) of the Settlement Agreement. 8/

The issue is not whether Chugach would benefit from application of the amended regulations to the conveyances in question; it clearly would. The question is whether those regulations can be applied. BLM's position is that the regulatory change "applies retroactively to land selections except that the specific provisions of the [Settlement] Agreement control in this instance" (BLM Answer at 3). We agree. As noted, the terms of the Settlement Agreement preclude application of the amended regulations in this case. 9/

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7/ It is highly unlikely that, if the Secretarial policy and regulatory amendment had been unfavorable to Chugach, it would now be arguing that the policy and amendment supersede the Settlement Agreement. 8/ Chugach seeks to circumvent the clear import of paragraph 21(A) by arguing that, since the May 1985 amendment of 43 CFR 2650.5-1(b) (1982) superseded the regulation in effect at the time of the four interim conveyances, that amendment "must be considered effective as of the date of conveyance to Chugach" (Chugach's Reply to Department of Agriculture Answer at 6). While the amendment clearly applied to prior conveyances to Native corporations, its effective date was May 20, 1985, well after the time of the four interim conveyances. Thus, we cannot say that the amended regulation was validly in force at the time of conveyance.

9/ Despite Chugach's assertion that it sought through the Settlement Agreement to assure equal treatment with other Native regional corporations, it does admit that some of the terms of the Settlement Agreement were more burdensome on it than on other regional corporations (SOR at 9), while counsel for BLM and the Department of Agriculture point out that other terms were more favorable to Chugach than to other corporations (BLM Answer at 4; Department of Agriculture Answer at 3). What appears clear is that the Settlement Agreement was intended to control the parties' actions. Our holding in this case is consistent with that intent.

Finally, Chugach contends that its position on the applicability of the Secretary's new policy is supported by evidence extrinsic to the Settlement Agreement. While extrinsic evidence may be relevant in interpreting the agreement (see Peterson v. Wirum, 625 P.2d 866, 871-2 (Alaska 1981)), we conclude that the documents referred to by Chugach do not support its position.

First, Chugach points to correspondence, dated from December 27, 1983, to February 7, 1984, between Jim Snow, an attorney with the Natural Resources Division, Office of General Counsel, U.S. Department of Agriculture, and Chugach's counsel, regarding Agriculture's proposal that the Settlement Agreement be amended to provide that inland submerged lands would be charged against Chugach's entitlement notwithstanding the policy set forth in the December 1983 Federal Register notice (SOR, Exhs. D-G). Chugach states that this correspondence indicates that Snow understood that this policy "would apply to Chugach absent an amendment to the Settlement Agreement" (SOR at 11). That correspondence does not bolster the position espoused by Chugach. Counsel for the Department of Agriculture represents that the proposed amendment was suggested in an attempt to clarify "any ambiguity regarding the submerged lands policy as applied to the CNI Settlement" (Department of Agriculture Answer at 6). He states that, not surprisingly, Chugach declined to agree. The present appeal is evidence that the parties still disagree over the application of the 1983 policy statement.

Second, Chugach refers to correspondence between John B. Crowell, Jr., Assistant Secretary for Natural Resources and Environment, U.S. Department of Agriculture, and William P. Horn, Deputy Under Secretary, U.S. Department of the Interior, in which Horn responded to Crowell's April 9, 1984, proposal that Interior change any regulations implementing the December 1983 Federal Register notice so as to exclude the Settlement Agreement. Crowell had expressed concern that the regulations might otherwise unilaterally amend the agreement. (SOR, Exh. H). In a July 19, 1984, letter, Horn responded that:

In the development of proposed regulations, we will consider the use of language indicating that all prior agreements will not be affected by implementing regulations. However, considering the specific language in paragraph 21 of the 1982 CNI Agreement, we do not see how this will change the effectiveness of the Agreement. With application of the December 5, 1983 submerged land policy, CNI will receive the amount of land equal to the submerged lands from BLM lands, specifically, from those lands withdrawn for regional deficiency pursuant to section 12(c) of ANCSA.

(SOR, Exh. I).

There is no evidence that the Department of the Interior had concluded that the December 5, 1983, policy was applicable to the subject conveyances, which were issued prior to December 5, 1983. The above correspondence does not support a contrary interpretation of paragraph 21(A) of the Settlement Agreement.



We conclude in accordance with paragraph 21(A) of the Settlement Agreement that submerged lands within areas under interim conveyances to Chugach made prior to December 5, 1983, are properly chargeable against Chugach's ANCSA entitlement in accordance with 43 CFR 2650.5-1(b) (1982), which was in effect at the time of conveyance. In its November 1985 decision, BLM properly declined to recalculate chargeable acreage in those conveyances.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Bruce R. Harris  
Administrative Judge

We concur:

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Gail M. Frazier  
Administrative Judge

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Will A. Irwin  
Administrative Judge